STATE OF MICHIGAN

IN THE SUPREME COURT

JOSEPH and THEODORA STAMPLIS,

Plaintiff-Appellees,

vs.

ST JOHN HEALTH SYSTEM, d/b/a RIVER DISTRICT HOSPITAL,

Defendant-Appellant,

and

G. PHILLIP DOUGLASS, D.O., jointly and severally, HENRY FORD HEALTH SYSTEMS, d/b/a HENRY FORD HOSPITAL,

Defendants. /

Supreme Court No.

Court Of Appeals No: 241801 op 6/1/04

St. Clair County Circuit Court No: K01-1051-NH

D. Kelly

126 980'

10/5

APPLICATION FOR LEAVE TO APPEAL BY DEFENDANT-APPELLANT, RIVER DISTRICT HOSPITAL

NOTICE OF FILING SUPREME COURT APPLICATION

NOTICE OF HEARING

EXHIBITS (Bound Separately)

AFFIDAVIT OF SERVICE

26281

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STATEMENT IDENTIFYING THE JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant River District Hospital seeks peremptory reversal of, or leave to appeal from, the Court of Appeals per curiam opinion of June 1, 2004, and denial of rehearing by order of August 5, 2004 (Exhibit A). Defendant seeks reinstatement of the trial court's order of dismissal with prejudice as to Dr. Douglass, and of summary disposition as to the Hospital (Orders attached as exhibit B).

In the sharply divided, yet unpublished, opinion, two of the three judges of the Court of Appeals (Hilda Gage and Kirsten Frank Kelly), by two separate opinions, concluded that, on different grounds and for different reasons, St. Clair County Circuit Court Judge Daniel J. Kelly had abused his discretion in declining to set aside under MCR 2.612 a stipulated order of dismissal of Dr. Douglass with prejudice. The two judge majority also apparently concluded the dismissal with prejudice would not have had res judicata effect, for purposes of barring vicarious liability claims against River District Hospital for Dr. Douglass' conduct, based upon the majority opinion in Larkin v Otsego Memorial Hospital Association, 207 Mich App 391; 525 NW2d 475 (1995) (although the lead opinion is not entirely clear in this regard as to how, or whether this issue was decided here).

In the lead Court of Appeals opinion, Judge Gage determined, evidently, that contrary to the finding of the trial court, there had been such "mistake" by plaintiff's counsel, and such "fraud" by Mr. Ralph Valitutti, counsel for River District Hospital and/or counsel for Dr. Douglass, that the trial court had no choice but to set the order of dismissal of Dr. Douglass aside under MCR 2.612(C). Judge Kirsten Kelly in the second opinion concluded that there had been a "clerical mistake" which required the

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stipulated order be vacated under MCR 2.612(A) (although this ground had never been argued by plaintiff below or on appeal).

This appeal offers an opportunity to the Court to correct clear error causing substantial injustice. MCR 7.302(B)(5). It also offers the Court the opportunity to provide clarification to bench and bar regarding several critical issues of ethical and/or jurisprudential significance. MCR 7.302(B)(3).

First, defendant submits that this Court should clarify that an order of dismissal with prejudice of an agent is to be given res judicata effect as to claims of vicarious liability against an alleged principal for the actions of the dismissed agent. In so doing, this Court should reject the contrary analysis of the majority in Larkin, supra, declining to apply basic legal principles in order to avoid an undesired, but legally compelled result.

Second, the Court should in this matter provide clarification of the scope of counsel's obligation to one's opponent in litigation, and liability for "fraud" in dealing with one's opponent by silence.

Finally, the Court should clarify the type of "fraud" or "mistake" which will permit an appellate court to find an abuse of discretion by the trial court in deciding whether to set aside a judgment under MCR 2.612. Defendant requests that the Court hold that the complained-of unilateral mistakes of fact or law by plaintiff's counsel as to the effect of an order of dismissal with prejudice, and defense counsel's silence regarding the same, do not suffice as a basis upon which to reverse the trial court for an abuse of discretion.

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE ORDER OF DISMISSAL WITH PREJUDICE OF DR. DOUGLASS OPERATED AS RES JUDICATA TO PRECLUDE PLAINTIFFS FROM PURSUING A CLAIM BASED ON DR. DOUGLASS' CONDUCT UNDER A THEORY OF VICARIOUS LIABILITY AGAINST RIVER DISTRICT HOSPITAL AND LARKIN V OTSEGO MEMORIAL HOSPITAL ASSOCIATION SHOULD BE DISAVOWED BY THIS COURT?

Defendant River District Hospital submits the answer is "Yes."

Plaintiffs assert the answer is "No."

The Court of Appeals held the answer is "No."

The trial court held the answer is "Yes."

II

WHETHER THE COURT OF APPEALS MAJORITY CLEARLY ERRED IN CONCLUDING, ALBEIT FOR DIFFERENT REASONS, THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DECLINING TO SET ASIDE THE STIPULATED VOLUNTARY ORDER OF DISMISSAL WITH PREJUDICE FOR EITHER FRAUD OR MISTAKE SUCH THAT THIS MATTER PRESENTS AN OPPORTUNITY FOR THIS COURT TO CLARIFY THE APPLICATION OF THE ABUSE OF DISCRETION STANDARD OF REVIEW, AS WELL AS THE LAW OF FRAUD AND MISTAKE IN THE CONTEXT OF OBLIGATIONS OF OPPOSING TRIAL COUNSEL TO EACH OTHER?

Defendant River District Hospital submits the answer is "Yes."

Plaintiffs assert the answer is "No."

The Court of Appeals held the answer is "No."

The trial court held the answer is "Yes."

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EXHIBITS

A - Court of Appeals opinion and order denying rehearing

B - Trial court orders

C - Stipulation and order of dismissal Dr. Douglass

D - Tr 4/16/02

E - Tr 4/17/02

F - Tr 5/13/02

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STATUTES, COURT RULES AND OTHER AUTHORITIES

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CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant River District Hospital seeks leave to appeal from, or peremptory reversal of, the Court of Appeals per curiam opinion of June 1, 2004 (Exhibit A).

This matter was before the Court of Appeals on appeal by plaintiffs Joseph Stamplis and Theodora Stamplis from the dismissal of their medical malpractice claims against River District Hospital by St. Clair County Circuit Court Judge Daniel J. Kelly, on summary disposition. This was as a consequence of the res judicata effect of the stipulated order dismissing codefendant G. Phillip Douglass, D.O., with prejudice (stipulation and order attached as Exhibit C).

That order of dismissal as to Dr. Douglass implemented an agreement proposed by plaintiffs' counsel and accepted by codefendant Dr. Douglass. The trial court determined that the dismissal with prejudice of Dr. Douglass, whose alleged malpractice and wrongdoing was the sole basis upon which vicarious liability was asserted against River District Hospital by the time of trial, required dismissal of the hospital as well under principles of res judicata.

As set forth further below, Judge Daniel Kelly thereafter denied plaintiff's motion for relief from judgment under MCR 2.612(C), in which plaintiff sought to set aside the stipulated order of dismissal for "mistake" and/or "fraud." The course of events leading to that order, and the Court of Appeals decision are as follows.

Pretrial Proceedings

Plaintiffs originally filed this medical malpractice claim in Wayne County Circuit Court on December 7, 1998 against three hospitals, including River District Hospital and Henry Ford Hospital, and 13 physicians. Plaintiffs alleged that there was a breach of the standard of practice by the various health care providers in failing to

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timely identify and treat an epidural abscess in Mr. Stamplis during several hospital admissions between January 27, 1997 and February 1, 1997. Plaintiffs alleged that such delay proximately caused plaintiff Joseph Stamplis to be rendered a paraplegic (complaint, ¶¶ 36-57).

During discovery, Dr. Douglass and River District Hospital initially were jointly represented by attorney Jane Garrett. As discovery proceeded, plaintiffs settled with and dismissed various defendants.

By order of March 29, 2001, venue was transferred to St. Clair County Circuit Court. On June 28, 2001, attorney Ralph Valitutti substituted in as counsel for defendant River District Hospital (appearance and order of substitution), while Ms. Garrett continued to represent Dr. Douglass.

By the time of trial, which began nearly a year after the splitting of the defense of the Hospital and Dr. Douglass, on April 16, 2002, the only defendants remaining in the case were this defendant, River District Hospital, and codefendants Henry Ford Hospital and Dr. Douglass. Dr. Douglass had been given the opportunity by plaintiff to settle for payment of his insurance policy limits but had declined, choosing a trial on the merits to clear his name, and so that there would be no need to report a settlement to the "National Practitioner Data Bank." (See Tr 4/17/02, pp 19, 22, 42 USC 11131; Tr 4/17/02 attached as Exhibit E.)

By the time of the events at issue in this appeal, the sole remaining claim against River District Hospital was that it was vicariously liable for the alleged malpractice of Dr. Douglass in treating plaintiff Joseph Stamplis. However, River District Hospital from the inception of this matter consistently had denied that Dr.

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Douglass was its agent, or that he had breached the standard of practice (Complaint and answer by River District Hospital, paragraph 19).

Trial And Agreement Between Plaintiffs And Dr. Douglass

On the morning of April 16, 2002, the first day of trial, counsel for plaintiffs approached counsel for Dr. Douglass, Ms. Jane Garrett. Plaintiffs' counsel unilaterally offered to voluntarily dismiss Dr. Douglass with prejudice without payment, if the doctor remained at court long enough to testify when called by plaintiffs. Previously, plaintiffs had demanded payment of all insurance coverage available to Dr. Douglass before dismissal (see statement by counsel for Dr. Douglass at Tr 4/17/02, p 19).

Thereafter, the parties or their representatives, their counsel and Judge Kelly convened in a chambers' conference room for the purpose of placing on the record all settlement offers and/or agreements (Tr 4/16/04, pp 4-7, attached as Exhibit D). Judge Kelly turned to each of the assembled groups, inquiring of each counsel regarding their own client's settlement stipulations and offers (Tr 4/16/04, pp 6-7). The court began its inquiry with Mr. and Mrs. Stamplis and their counsel (Id., p 7), and then turned to counsel for Dr. Douglass (Id., pp 8-9).

Counsel for Dr. Douglass recounted acceptance of plaintiffs' offer, and the agreement between Dr. Douglass and plaintiffs (Tr 4/16/02, p 9). The hospital had not in any way participated in or agreed to the settlement agreement between plaintiffs and Dr. Douglass (see trial court at Tr 4/17/02, p 32, statement by hospital's counsel at Tr 4/17/02, pp 9-10, statement by plaintiffs' counsel at Tr 4/17/02, pp 28, 32). As later pointed out by counsel for Dr. Douglass, the obvious motive of plaintiff's counsel for such a strategic move was to eliminate at trial a sympathetic individual

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defendant with his own adversarial trial counsel, and leave the deep pocketed corporate defendants to face the jury alone:

> [BY MS. GARRETT:] Obviously, this arrangement also had the benefit for plaintiffs that they would then be opposing only two corporate defendants, no individual defendant, and they would be opposing two lead counsel rather than three. [Tr 4/17/02, p 20.]
>
> (See also similar observation by counsel for the hospital at Tr 4/17/02, p 26.)

After counsel for Dr. Douglass recounted the agreement between her client and plaintiffs (Tr 4/16/02, pp 7-8), counsel for plaintiffs stated that he did intend to dismiss Dr. Douglass as a defendant and proceed against what he "presumed" to be Dr. Douglass' principal, River District Hospital. Counsel for Dr. Douglass, however, replied and made clear what the agreement had been, and that the dismissal of Dr. Douglass had to be, with prejudice, with which plaintiffs' counsel agreed:

> MR. KENNEY [plaintiff's counsel]: I intend to dismiss Dr. Douglass as a defendant and proceed against what I presume to be his principal, the hospital, that's my agreement.
>
> THE COURT: Okay.
>
> MR. KENNEY: And the other terms he will remain until the close of business Friday so that I can put him on the stand, that's part of the agreement, as well.
>
> MS. GARRETT [counsel for Dr. Douglass]: Well, I believe that it was agreed in chambers that it would be a dismissal with prejudice.
>
> MR. KENNEY: With prejudice, but what I don't want to face, Judge, obviously is that I have dismissed the claims against the hospital for the actions of Dr. Douglass. I'm not doing that. He was the actor.
>
> THE COURT: I understand that. I'm sure they do, too. Next.
> [Tr 4/16/02, pp 9-10.]

The last statement by the trial court regarding understanding the plaintiffs' intent followed and was specifically with reference to plaintiffs and Dr. Douglass, and

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to their comments regarding their separate understandings of their specific agreement (Id., p 10).

The hospital was not a party to or involved in the settlement agreement between the doctor and plaintiffs. Counsel for the hospital had no reason to comment on the same at the time. Further, this was not in the context of a courtroom setting, nor were counsel expected or permitted to engage in legal argument.

The trial judge then turned to Mr. Valitutti, counsel for River District Hospital, to place on the record his client's settlement position. Mr. Valitutti did so, stating the Hospital's offer of $300,000 (Id., pp 10-11). Counsel for Henry Ford Hospital, then placed on the record settlement offer they had made to plaintiffs (Tr 4/16/02, pp 10-12).

Following a brief break, proceedings reconvened. Plaintiffs indicated that they had rejected the settlement offers of River District Hospital and Henry Ford Hospital, and wished to proceed to trial (Tr 4/16/02, pp 13-14).

At this point, counsel for Dr. Douglass noted for the record that over the noon hour a stipulation and order of dismissal of Dr. Douglass had been prepared and executed by all counsel, and had just been signed by the court (Id., p 15). As conceded by plaintiffs' counsel upon later inquiry by the trial court, whatever intentions had been expressed orally by plaintiffs' counsel at the in-chambers conference, the stipulation and order of dismissal included no provision reserving any claim by plaintiffs against the hospital based on vicarious liability for Dr. Douglass (Tr 4/17/02, p 28, stipulation and order attached).

The parties then began to discuss the voir dire procedure (Id., pp 15-19). At that point, and based on the legal effect of the order of dismissal of Dr. Douglass

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which had been entered, counsel for River District Hospital requested an opportunity to present a motion for summary disposition on behalf of the hospital prior to proceeding with voir dire. The trial court indicated that the motion would have to wait until after the jury was selected (Id., pp 19-20).

Counsel for plaintiffs then suggested that counsel for Dr. Douglass should leave the courtroom. Counsel for Dr. Douglass indicated that she would leave unless she was asked to stay; after conferring with counsel for the hospital, Ms. Garrett indicated that she would appear as co-counsel for River District Hospital at that point (Id., p 20). (As Ms. Garrett had represented River District Hospital for the first three years of the litigation and during virtually all discovery, access to her knowledge during what would be a very lengthy trial was obviously important to the hospital.)

Voir dire proceeded on the afternoon of April 16, 2002, with Ms. Garrett acting as co-counsel for the hospital before the jury.

Hospital's Motion To Dismiss Based On Res Judicata Effect Of Dismissal With Prejudice

On the morning of April 17, 2002, before continuing with voir dire, the court excused the jury in order to more fully discuss the motion for summary disposition on behalf of the hospital (Tr 4/17/02, p 7). Counsel for the hospital submitted that the order of dismissal with prejudice entered as to Dr. Douglass was entitled to res judicata effect and required the dismissal of the hospital as the only claims against it were based on vicarious liability for Dr. Douglass. The hospital's counsel relied upon Brownridge v Michigan Mutual Ins Co, 115 Mich App 745, 748; 321 NW2d 798 (1982), and Limbach v Oakland County Road Commissioners, 226 Mich App 389; 573 NW2d 336 (1997).

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Hospital counsel acknowledged the case of Larkin v Otsego Memorial Hospital, 207 Mich App 391; 525 NW2d 475 (1994), but submitted that it was distinguishable from this matter on several grounds. Counsel for the hospital noted that, in contrast to Larkin, no agreement was ever entered here that the hospital would be responsible for the actions or omissions of the doctor. Further, counsel for the hospital here was not a party to the negotiations regarding or agreement to dismiss Dr. Douglass, as had been the case in Larkin (Tr 4/17/02, pp 8-10).

Plaintiffs' counsel responded that if in fact the stipulated order of dismissal with prejudice had a res judicata effect, it should be set aside because "whether or not Mr. Valitutti agreed with that or not, the clear intent that I had and my clients had in dismissing Dr. Douglass was to A, avoid his having to stay here for the entire length of the trial, to get him on and off the stand, and to proceed against the principal." (Tr 4/17/02, pp 12-13.) Plaintiffs' counsel suggested that "we can have a decision on the merits of this case by merely indicating that this was a dismissal without prejudice," and that there could be an agreement not to again sue Dr. Douglass, in the nature of a covenant not to sue (Tr 4/17/02, pp 13-14). Counsel for plaintiff for the first time asked that the order reflect the dismissal of Dr. Douglass without prejudice (Id.).

In response to plaintiffs' counsel's demand that the dismissal with prejudice be amended into a dismissal without prejudice, counsel for Dr. Douglass objected strenuously. Counsel noted that this would violate the parties' agreement, and further noted that plaintiffs' counsel's intent with regard to another defendant had not been any part of the agreement between plaintiffs and Dr. Douglass, nor part of the written stipulation and order entered by the court:

> [MS. GARRETT:] What Mr. Kenney may have intended with regard to another defendant is not part of our agreement. I did not have any

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> authority or interest in making concessions on the part of another defendant, what they would do, what their liability would be, what Mr. Kenney's case against them would be. My concern was with Dr. Douglass. The exchange was that he would be dismissed without payment if he would continue to make himself available for testimony until Friday of this week.
>
> The stipulation, including the language with prejudice, which was a crucial factor to my mind, was stated in chambers in the presence of the court and all counsel. Plaintiff agreed with the statement. The stipulation was restated on the record twice, I believe, that it was with prejudice. A written stipulation and order was prepared over the lunch hour. It was presented to Mr. Kenney for review after we got back from lunch. He took it out to confer with his co-counsel. He signed the stipulation. The court entered the order. Two copies were made and they were circulated to all counsel. I believed this issue was closed. [Id., Tr 4/17/02, pp 20-21.]

Counsel for Dr. Douglass further noted that dismissal with prejudice was crucial to Dr. Douglass to ensure that the case had been fully and finally decided as to him, and that he was protected from any further action (Tr 4/17/02, p 21).

Counsel for Dr. Douglass objected to the court entering an order contrary to the parties' agreement:

> [MS. GARRETT:] Plaintiffs appear to be suggesting that the court convert the order that we entered into expressly to a different agreement which we did not enter into. I did not agree to a dismissal without prejudice. Under those circumstances, Mr. Kenney, if the current trial does not turn out the way he likes can turn around and sue Dr. Douglass again because the statute has a substantial time to run, having been told [sic, tolled] during a pendency of this litigation. I did not agree to a covenant not to sue. That also has implications for further action that can be taken against my defendant [e.g., for indemnification]. My objective was to extricate him from this case finally and totally, and that is the purpose of these orders with prejudice, to have some finality to the positions of the parties. [Tr 4/17/02, p 22.]

Counsel for Dr. Douglass reiterated that there had been no discussion of, or agreement to a covenant not to sue; what had been agreed to, and ordered by the court, was a dismissal with prejudice (Tr 4/17/02, p 27).

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In response to inquiry by the court, counsel for plaintiff conceded that his only agreement had been with counsel for Dr. Douglass and not with the hospital:

> THE COURT: The question I have to address is who was your agreement with. Was it with counsel for Dr. Douglass only or was it with counsel for Dr. Douglass and counsel for River District Hospital?
>
> MR. KENNEY: My agreement was with Dr. Douglass' lawyer. * * *
>
> I do not intend to dismiss the claims against the hospital for the actions of Dr. Douglass.
>
> THE COURT: I understand that. The question comes is that classified as a mistake of law or a mistake of fact.
>
> MR. KENNEY: I think it's a mistake of fact because it's a mistake as to what our agreement was. Because I'm thinking that our agreement is -
>
> THE COURT: Again, your agreement with whom?
>
> MR. KENNEY: My agreement with Dr. Douglass.
>
> * * *
>
> MR. KENNEY: And the intent of my agreement with Dr. Douglass is that I will dismiss you as long as my dismissal of you does not operate to dismiss my claims against the hospital. That's a covenant not to sue.
>
> THE COURT: That's the critical point. You can have an agreement with them, but they're not in a position to speak for the hospital.
>
> MR. KENNEY: I appreciate that. But still, nevertheless, a covenant not to sue would be the same thing. [Tr 4/17/02, pp 29-30.]

Responding to plaintiffs' counsel's belief that the court had stated earlier that plaintiff could still pursue a claim of vicarious liability against the hospital, the court indicated that it had simply meant that counsel had made his point. The court noted, however, that this did not suffice to render the parties bound to an interpretation of "with prejudice" that would not have the normal meaning attached to it by the law (Tr 4/17/02, p 33).

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Trial Court Ruling

After considering arguments of the parties and plaintiffs' request for relief from judgment or order under MCR 2.612, and indicating that it was the preference of the court to decide cases upon their merits, Judge Daniel Kelly found that it could not grant relief where plaintiffs' claim of vicarious liability was barred by operation of law:

> [THE COURT:] The decision to dismiss Dr. Douglass with prejudice is res judicata as to any liability against River District Hospital. The law is well settled on that point. Further, there is no credible evidence that the dismissal was understood by the doctor to be merely a covenant not to sue. At the same time, the record is also very clear that counsel for plaintiff never intended to waive his right to pursue vicarious liability claims against River District Hospital. Unfortunately for plaintiffs it has had that legal effect.
>
> Silence in the face of plaintiff's counsel's declaration of intent does not amount to an agreement. The attorneys for the defendants owed their duty only to their clients. Further, I am of the opinion that the relief being sought under MCR 2.612 is not justified under the facts of this case. Any mistake made is a mistake of law and not of fact.
>
> Plaintiff's counsel repeatedly acknowledged that the dismissal was to be with prejudice. Nowhere did River District Hospital agree to waive its legal defense of res judicata. Additionally, while subsection (c) (1) (f) offers broad leeway when extraordinary circumstances demand vacating orders to achieve justice, it has never been interpreted to be designed to relief [sic] of ill-advised or careless decision. [Tr 4/17/02, pp 35-36.]

Shortly thereafter, counsel for plaintiffs and counsel for codefendant, Henry Ford Hospital, placed on the record an agreement to settle the claim against Henry Ford for 1.5 million dollars (Tr 4/17/02, pp 38-39). (This was in addition to the $850,000 which had been paid in settlement by previously dismissed defendants.)

Plaintiffs filed a motion for reconsideration of the denial of their motion for relief from judgment, which the trial court denied after allowing argument by counsel (Tr 5/13/02, attached as Exhibit F). Plaintiffs thereafter appealed by right to the Court of Appeals.

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Court of Appeals Opinion

Judge Gage in the first opinion of the Court of Appeals stated that Larkin v Otsego Memorial Hospital Association, 207 Mich App 391; 525 NW2d 475 (1995), in which the Court of Appeals had held that the nature of the agreement for dismissal in that case was such that it did not have res judicata effect "would be applicable but for the conduct of the parties' attorneys before the trial court." (Slip opinion, p 6.) This statement is not entirely clear, in that the first opinion goes on to conclude the judgment should be set aside under MCR 2.612 (which discussion would be entirely unnecessary if the Court believed Larkin applicable).

Two of the three judges, Hilda Gage and Kirsten Frank Kelly, by two separate opinions, the concluded that, on different grounds and for different reasons, St. Clair County Circuit Court Judge Daniel J. Kelly had abused his discretion in declining to set aside a stipulated order of dismissal under MCR 2.612(A) or (C). In the lead opinion for reversal, Judge Gage concluded that Judge Daniel Kelly abused his discretion in declining to set aside the judgment under MCR 2.612(C)(1)(a)(c) and/or (d). Judge Gage concluded that there was a mistake by plaintiff's counsel "with respect to the effect of the written stipulation," and, apparently "fraud" by Mr. Ralph Valitutti, counsel for the hospital, on the trial court and/or opposing counsel in this adversarial proceeding.

In the second opinion for reversal, Judge Kelly concludes that Judge Daniel Kelly abused his discretion in failing to set aside the stipulation, and order, because of a "clerical mistake," under MCR 2.612(A) (although no request was ever made by plaintiff on this ground, either below or on appeal.)

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Judge Christopher Murray in an opinion for affirmance dissented on the basis that "the law and facts of record require that the learned trial court judge, who was intimately more familiar with the attorney's and proceedings occurring before it, be affirmed."

This application is submitted by defendant River District Hospital in support of the trial court's legal ruling and exercise of discretion; defendant requests that this Court reinstate the decision of the trial court.

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ARGUMENT

I. THE ORDER OF DISMISSAL WITH PREJUDICE OF DR. DOUGLASS OPERATED AS RES JUDICATA TO PRECLUDE PLAINTIFFS FROM PURSUING A CLAIM BASED ON DR. DOUGLASS' CONDUCT UNDER A THEORY OF VICARIOUS LIABILITY AGAINST RIVER DISTRICT HOSPITAL; LARKIN V OTSEGO MEMORIAL HOSPITAL ASSOCIATION SHOULD BE DISAVOWED BY THIS COURT.

The trial court held that the voluntary dismissal with prejudice of an agent operates as res judicata and precludes a claim based on the agent's conduct under Limbach v Oakland Board of Road Commissioners, 226 Mich App 389, 392-393; 573 NW2d 336 (1997). Judge Murray, in his dissent in the Court of Appeals agreed.

The Court of Appeals in the first opinion stated that Larkin v Otsego Memorial Hospital Association, 207 Mich App 391; 525 NW2d 475 (1995), in which the Court of Appeals had held that the nature of the agreement for dismissal with prejudice there was such that it did not have res judicata effect, "would be applicable but for the conduct of the parties' attorneys before the trial court." (Slip opinion, p 6.) This statement is not entirely clear in that the lead opinion goes on to conclude the judgment should be set aside under MCR 2.612 (which would be unnecessary if the Court believed Larkin applicable).

Regardless, however, defendant submits that under basic principles of Michigan jurisprudence, a voluntary dismissal with prejudice of an agent operates as res judicata as to, and precludes a claim against a principal based on the agent's negligence. This Court should take this opportunity to examine, and reject as flawed, the analysis of the two-judge majority in Larkin, supra, and in any event declare that opinion is of no application factually or legally to the facts here.

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A. An Order Of Dismissal With Prejudice Of An Agent Operates As Res Judicata And Precludes A Claim Against The Principal Based On The Agent's Conduct.

An order of dismissal with prejudice of an agent operates as res judicata as to, and precludes a claim against a principal based on the agent's negligence. As recognized by Judge Murray in his dissent, this conclusion follows necessarily from two fundamental principles of Michigan jurisprudence.

First, Michigan law is clear and long established that a voluntary dismissal with prejudice pursuant to stipulation of the parties is a final judgment on the merits for res judicata purposes. Limbach v Oakland Board of Road Commissioners, 226 Mich App 389, 392-393; 573 NW2d 336 (1997), Boland v CD Barnes Associates, 126 Mich App 337 NW2d 581 (1982), Brownridge v Michigan Mutual Insur Co, 115 Mich App 745, 748; 321 NW2d 798 (1982). As was declared in 46 Am Jur 2d Judgments, § 609:

> The term "with prejudice" expressed in a judgment of dismissal, has a well recognized legal import; and it indicates an adjudication of the merits, operating as res judicata, concluding the rights of the parties, terminating the right of action, and precluding subsequent litigation of the same cause of action, to the same extent as if the action had been prosecuted to a final adjudication adverse to the plaintiff.

In Brownridge v Michigan Mutual Ins Co, supra, plaintiff stipulated to the dismissal with prejudice of a sex discrimination claim she had filed in federal court and an order dismissing the case with prejudice was entered. In dismissing a subsequent suit by plaintiff against the employer in state court alleging a violation of the Uniform Trade Practices Act, the Court held that the state court claim was barred by res judicata. The Court of Appeals held that "'a voluntary dismissal with prejudice is a final judgment on the merits for res judicata purposes.'"

In Boland v CD Barnes Associates, Inc, 126 Mich App 569; 337 NW2d 581 (1983), the Court held that a voluntary dismissal with prejudice pursuant to stipulation

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of the parties in a foreclosure action barred under the doctrine of res judicata a subsequent claim between the same parties for the improper filing and perfecting of a mechanics' lien on the same office complex project. Thus, Michigan law is clear that a voluntary dismissal with prejudice has res judicata effect.[1] Further, plaintiffs' counsel here conceded that the agreement to dismiss and dismissal of Dr. Douglass was intended to operate as a "decision on the merits." (Tr 4/17/02, pp 13-14.)

Second, Michigan law is also clear that a judgment on the merits in favor of an agent bars the plaintiff from litigating the same cause of action against the principal under res judicata principles. DePolo v Greig, 338 Mich 703, 709; 62 NW2d 441 (1954). In DePolo, the Supreme Court held that a judgment in favor of a corporation was binding and precluded a claim against the agent. The Supreme Court premised that conclusion on the even more fundamental precept that judgment for the agent precludes, under res judicata principles, an action against the principal:

> The present case is controlled by that of Krolik v Curry, 148 Mich 214, where we said (page 222):
>
> "Where a litigant has chosen to proceed against the agents of a corporation for misconduct on their part and has been defeated, he is thereby barred from litigating the same cause of action against the principal."

These two principles--that a stipulated order of dismissal with prejudice is a judgment on the merits, and that a judgment on the merits in favor of an agent is preclusive and binding as to a claim by that same plaintiff against the principal for the agent's wrongdoing--compel the conclusion that the trial court properly dismissed

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[1] Federal courts are in accord that a voluntary dismissal with prejudice is a final judgment on the merits for res judicata purposes. See Nemaizer v Baker, 793 F2d 58, 61 (CA 2, 1986), Astron Industrial Association, Inc v Chrysler Motors Corp, 405 F2d 958 (CA 5, 1968).

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River District Hospital. As a matter of both the intent of the parties, and as a matter of law, the stipulated order of dismissal with prejudice operated as an adjudication on the merits in favor of Dr. Douglass. That adjudication on the merits therefore as a matter of law barred further litigation as to the same claim against Dr. Douglass' alleged principal, River District Hospital, for Dr. Douglass' alleged wrongdoing.

B. This Court Should Take This Opportunity To Disavow Larkin v Otsego Memorial Hospital Association, Which Was Wrongly Decided And/Or Is Factually Distinguishable From This Matter.

The trial court and Judge Murray of the Court of Appeals properly concluded that Larkin v Otsego Memorial Hospital Association, 207 Mich App 391; 525 NW2d 475 (1995), was not determinative of the issue of the effect of the stipulated order of dismissal with prejudice under the particular facts of this case. Larkin is completely distinguishable from this matter factually; as urged in the dissenting opinion by Judge, now Justice Taylor, it also was wrongly decided.

In Larkin, counsel for plaintiff and defense counsel, who represented both the hospital and the defendant physician, Dr. Kim, entered into a stipulation and order to dismiss Dr. Kim. This stipulation occurred after an admission by the hospital that there was an agency relationship between it and Dr. Kim. Larkin, 392-393. While the written stipulation and order did not expressly reserve plaintiff's claim against the hospital, "it stated that the hospital was legally responsible for the actions of Dr. Kim, and that his dismissal was based on the hospital's acknowledgement that Dr. Kim was the hospital's agent for purposes of that case." Larkin, 396, emphasis added.

Over a vigorous dissent by Judge, now Justice Taylor, two members of the Court of Appeals panel in Larkin concluded that "[o]n the facts presented, the stipulation and order to dismiss was a covenant not to sue, not a consent judgment or

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a release." Larkin, supra, 394. The Court further declined to apply res judicata principles noted in Brownridge v Michigan Mutual Ins Co, supra, upon a finding that the facts in Larkin were governed by Boucher v Thomsen, 328 Mich 312; 43 NW2d 866 (1950). The Larkin majority applied Boucher in light of the parties' agreement in Larkin that the hospital was legally responsible for the actions of the agent, Dr. Kim, indicating an intent by all parties (as counsel for the hospital and the doctor were one and the same) that the hospital would continue to be held liable for the doctor. Larkin, 396.

First, defendant submits that Larkin was wrongly decided, for the reasons advanced by Judge, now Justice Taylor, in his dissent in Larkin:

> There is no meaningful distinction between the stipulated dismissal with prejudice in this case and the judgments in Felsner and Rzepka. By definition, a dismissal with prejudice constitutes a relinquishment of the suit rather than merely an agreement not to sue on an existing claim. A dismissal with prejudice is
>
> "[a]n adjudication on the merits, and final disposition, barring the right to bring or maintain an action on the same claim or cause. It is res judicata as to every matter litigated." [Black's Law Dictionary (5th ed).]
>
> Indeed, in Brownridge v Michigan Mutual Ins Co, 115 Mich App 745, 748; 321 NW2d 798 (1982), this Court held that a voluntary dismissal with prejudice is a final judgment on the merits, with res judicata effect. This Court again emphasized the meaning of a dismissal "with prejudice" in In re Koernke Estate, 169 Mich App 397; 425 NW2d 795 (1988). The Koernke Court held that because an order did not state that it was without prejudice, the order was a judgment on the merits. Id. at 400. Applying the reasoning in these cases, which have put flesh on the bones of Theophelis, and the legal definition of the term "dismissal with prejudice," it is apparent that the stipulation and order to dismiss with prejudice is the equivalent of a consent judgment, and, as the Court in Felsner held, a consent judgment operates as a release. [Larkin, supra, p 399, dissent by Taylor.]

Further, this matter is clearly factually distinguishable from Larkin. Here, in stark contrast to Larkin, there were no circumstances which permitted avoidance of

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basic jurisprudential principles of res judicata triggered by the "with prejudice" order of dismissal. In contrast to Larkin, there was here no agreement sought and entered into by counsel for the hospital, and reduced to a written stipulation and order, in which the hospital acknowledged and accepted continuing responsibility for vicarious liability for the dismissed physician.

The hospital and physician here were represented by separate counsel at trial, and for 10 months preceding trial. It was counsel for plaintiffs who unilaterally approached counsel for Dr. Douglass and proposed the voluntary dismissal with prejudice (see Tr 4/17/02, p 19). This was a deliberate strategy decision by plaintiffs' counsel to ease plaintiffs' burden at trial by eliminating an additional party represented by separate counsel who would have had an independent right to separately open and close, and cross examine and present witnesses (See Tr 4/17/02, pp 20, 26).

There was here no participation by counsel for the hospital in the settlement discussions or in the settlement agreement reached between counsel for Dr. Douglass and plaintiffs. Plaintiff's counsel here conceded repeatedly that his agreement was with Dr. Douglass, not with counsel for the hospital (Tr 4/17/02, pp 28-30, 32; see also trial court at Tr 4/17/02, p 32, statement by hospital's counsel at Tr 4/17/02, pp 9-10).

> THE COURT: The question I have to address is who was your agreement with. Was it with counsel for Doctor Douglass, only, or is it with counsel for Doctor Douglass and counsel for River District Hospital?
>
> MR. KENNEY: My agreement was with Doctor Douglass's lawyer. [Tr 4/17/02, p 28.]

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There also was here no representation or agreement by counsel for the hospital, nor any provision in the stipulation and order, in which the hospital acknowledged responsibility for the alleged agent Dr. Douglass, which could have misled plaintiffs' counsel. This is a critical distinction from the situation in Larkin, in which the stipulation and order specifically stated that the hospital was legally responsible for the actions of the physician, and that his dismissal was based on the hospital's acknowledgement that the doctor was the hospital's agent for purposes of that case. Larkin, 396.

Here the hospital never conceded and in fact vigorously asserted that it was not vicariously liable for the physician, Dr. Douglass (see complaint and answer, ¶ 19, statement by hospital's counsel at Tr 4/17/02 pp 9, 16-17).

> [BY COUNSEL FOR THE HOSPITAL: With respect to his [plaintiffs'] contention that Defendant Hospital is guilty of sandbagging--sandbagging in the lowest fashion, let me state this. At no time did I give up the hospital's defenses as to agency. The agency defense is an agency [sic, defense] that exists today, has never been given up. [Plaintiffs' counsel] never spoke of it once, even in his argument now. . . . I never stipulated that Doctor Douglass is the agent of the hospital. That's the distinguishing characteristic of the Larkin case. [Tr 4/17/02, pp 16-17.]

In fact, separate representation of the hospital and Dr. Douglass was undertaken (10 months before trial) precisely to allow counsel representing the hospital to assert before the jury (without conflict in also representing the interests of Dr. Douglass) that the hospital should not be held vicariously liable for Dr. Douglass. (Dr. Douglass, while a member of the medical staff, was not employed by the hospital, creating an issue of fact as to ostensible agency under Grewe v Mt Clemens General Hospital, 404 Mich 240; 273 NW2d 429 (1978).) There was here, in contrast to Larkin, supra, 396, no admission of agency or implied admission of responsibility

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negotiated for or incorporated into the stipulation and order between Dr. Douglass and plaintiffs. Plaintiff's counsel conceded he was aware he had the obligation to prove agency whether Dr. Douglass was in or out of the case (Tr 4/17/2, p 18).

Further, as noted by Dr. Douglass' counsel, plaintiffs' counsel's unilateral oral statement of his intent that the dismissal of Dr. Douglass would not affect his claim against the hospital was never part of his negotiations or agreement with counsel for Dr. Douglass (Tr 4/17/02, pp 20-21). It was only after the agreement had been reached and placed on the record by counsel for Dr. Douglass, that plaintiffs' counsel asserted his own, subjective intent regarding the legal impact on the hospital of the agreement with the doctor. Unlike Larkin, or Boucher v Thomsen, 328 Mich 312; 43 NW2d 866 (1950), upon which it relied, there was no agreement which effectively rendered the order a covenant not to sue rather than a dismissal with prejudice and res judicata effect.

Not only was that unilateral, subjective intent never concurred in by either counsel for Dr. Douglass or counsel for the hospital, but that unilateral, subjective intent then was never set forth in or by implication ratified in the written stipulation and order.

> THE COURT: Did anyone authorize you to have the right to continue to proceed against the hospital in the course of the entry of the order? Is there anywhere in that order that gives you the specific authorization?
>
> MR. KENNEY: No. No. *** [Tr 4/17/02, p 28.]

(See also Tr 4/17/02, p 32.)

This was completely unlike the situation in Larkin, where defense counsel, who represented both the hospital and the doctor/agent, essentially solicited a dismissal with prejudice of the doctor from plaintiff's counsel with the understanding that the

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hospital would admit that the dismissed defendant was the hospital's agent. There was here no such inducement by counsel for either Dr. Douglass or River District Hospital. This is also unlike Larkin in that the written stipulation and order contained no reference whatsoever to the effect on the hospital of the agreement or dismissal.

A final distinction is the fact that in Larkin, and in Boucher, upon which Larkin relied, plaintiffs and the doctor did not agree to a judgment "on the merits." Larkin, supra, 394. In Larkin, the Court specifically noted that "if the order of dismissal is on the merits, the decision is res judicata with respect to the parties." Larkin, 394-395, n 2.) Here, in contrast, plaintiffs' counsel effectively conceded that the dismissal of Dr. Douglass was intended to operate as a "decision on the merits". (Tr 4/17/02, pp 13-14.)

Accordingly, Larkin v Otsego Memorial Hospital does not justify a refusal to apply fundamental principles of law here. This Court should reject Larkin and re-embrace fundamental principles of jurisprudence to hold that an order of dismissal with prejudice of an agent operates as res judicata and precludes a claim against the principal based on the agent's conduct.

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II **THE COURT OF APPEALS MAJORITY CLEARLY ERRED IN CONCLUDING, ALBEIT FOR DIFFERENT REASONS, THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DECLINING TO SET ASIDE THE STIPULATED VOLUNTARY ORDER OF DISMISSAL WITH PREJUDICE FOR EITHER FRAUD OR MISTAKE; THIS MATTER PRESENTS AN OPPORTUNITY FOR THIS COURT TO CLARIFY THE APPLICATION OF THE ABUSE OF DISCRETION STANDARD OF REVIEW, AS WELL AS THE LAW OF FRAUD AND MISTAKE IN THE CONTEXT OF OBLIGATIONS OF OPPOSING TRIAL COUNSEL TO EACH OTHER.**

A trial court's decision whether to set aside an order under MCR 2.612 is reviewed for an abuse of discretion. Limbach v Oakland Board of Road Commissioners, 226 Mich App 389, 392-393; 573 NW2d 336 (1997). Contrary to the conclusion (for different reasons) by two judges of the Court of Appeals, there is not a basis in law or in this record upon which it could be found that Judge Daniel Kelly abused his discretion in denying plaintiffs' request that the order of dismissal with prejudice implementing the agreement with Dr. Douglass sought and pursued by plaintiffs' counsel be set aside under MCR 2.612(C).

Rule 2.612(A) upon which Judge Kirsten Kelly relied, and MCR 2.612(C), upon which Judge Gage relied, set forth the grounds for granting relief from judgment or order in relevant part, as follows:

> Rule 2.612 Relief From Judgment or Order
>
> (A) Clerical Mistakes.
>
> (1) Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after notice, if the court orders it.
>
> * * *
>
> (C) Grounds for Relief from Judgment.

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(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(a) mistake, inadvertence, surprise or excusable neglect.

* * *

(c) Fraud (intrinsic or extrinsic) misrepresentation, or other misconduct of an adverse party.

(d) The judgment is void.

The order which plaintiffs sought to set aside here was not merely an order entered by the court intended to adjudicate the merits of the claim against Dr. Douglass. Rather, it was an order entered pursuant to a voluntary agreement initially proposed and sought by plaintiffs (and not by the defendant hospital), and confirmed on the record before the court. In order to set aside that negotiated order, then, plaintiffs were required to establish both grounds to set aside their agreement with Dr. Douglass, and grounds to set aside the order of the court implementing that agreement, and that the trial court abused its discretion in declining to set both aside. This, plaintiffs failed to do, and the two judges of the Court of Appeals erred in concluding reversal was permissible.

A. Where Two Judges Of The Court Of Appeals Could Not Agree As To The Basis Upon Or Rule Under Which The Trial Court Should Have Set Aside The Order Of Dismissal With Prejudice, There Cannot Have Been An Abuse Of Discretion By The Trial Court In Declining To Do So.

In the first opinion for reversal, Judge Gage concluded that Judge Daniel Kelly abused his discretion in declining to set aside the judgment under MCR 2.612(C)(1)(a)(c) and/or (d). Judge Gage concludes that there was a mistake of plaintiff's counsel "with respect to the effect of the written stipulation," and, apparently

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"fraud" by Mr. Ralph Valitutti, counsel for the hospital, on the trial court and/or opposing counsel in this adversarial proceeding.

In the second opinion for reversal, Judge Kelly concludes that Judge Daniel Kelly abused his discretion in failing to set aside the stipulation, and order, because of a "clerical mistake," under MCR 2.612(A) (although no request was ever made by plaintiff on this ground, either below or on appeal.)

Defendant submits that the Court of Appeals in the two opinions for reversal failed to appropriately apply the standard of review to the question of whether the order of dismissal with prejudice should be set aside. The Court clearly exceeded its authority both to defendant's substantial prejudice and in violation of this Court's mandated standard of review. This was clear error which warrants intervention by this Court pursuant to MCR 7.302(B)(5).

Where there has been a valid exercise of discretion, appellate review is sharply limited. Alken-Ziegler, Inc v Waterbury Headers Corp, 461 Mich 219, 227; 600 NW2d 638 (1999). Unless there has been a clear abuse of discretion, a trial court's ruling will not be set aside. Id. In Alken-Ziegler, Inc, the Court, in application of the abuse of discretion standard of review to reinstating a trial court's decision refusing to set aside a default in which the Court of Appeals sought to set aside, reaffirmed that standard:

> An abuse of discretion involves far more than a difference in judicial opinion. Williams v Hofley Mfg Co, 430 Mich 603, 619; 424 NW2d 278 (1988). It has been said that such abuse occurs only when the result is "'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" Marrs v Bd of Medicine, 422 Mich 688, 694; 375 NW2d 321 (1985), quoting Spalding v Spalding, 355 Mich 382, 384-385; 94 NW2d 810 (1959), and noting that, although the Spalding standard has been

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> often discussed and frequently paraphrased, it has remained essentially intact.
>
> This Court historically has cautioned appellate courts not to substitute their judgment in matters falling within the discretion of the trial court, and has insisted upon deference to the trial court in such matters.

See also AMCO Builders & Developers, Inc v Team ACE Joint Venture, 469 Mich 90; 666 NW2d 623 (2003), again affirming a trial court's determination refusing to set aside a default, and reversing the Court of Appeals interference with that exercise of discretion.

To warrant interference by the Court of Appeals in a matter so entirely in the sound discretion of the circuit court as the granting or refusing of a motion to set aside the judgment under MCR 2.612(A) or (C), "'the abuse of discretion ought to be so plain that, upon consideration of the facts upon which the court acted, an unprejudiced person can say that there was no justification or excuse for the ruling made.'" Alken-Ziegler, supra, 228. Where not even two members of the appellate court can agree upon basis upon which the judgment should be set aside, the trial court's refusal to do so logically cannot be an abuse of discretion. Further, as set forth below, the bases stated in the opinions do not as a matter of law or fact establish an abuse of discretion by the trial court.

B. The Court Of Appeals In The Lead Opinion For Reversal Clearly Erred In Finding On This Record And Under Michigan Law That There Was Both Such "Fraud" By Mr. Ralph Valitutti, Counsel For The Hospital, In Failing To Act As An Advocate For Opposing Counsel And/Or Such "Mistake" By Counsel For Plaintiffs, That The Denial Of Relief Under MCR 2.612(C) Was An Abuse Of Discretion.

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The Court of Appeals in the lead opinion concluded (evidently) that there was such "fraud" by attorney Ralph Valitutti (or counsel for Dr. Douglass) on the trial court

as well as (apparently) on opposing counsel, and such "mistake" by plaintiffs' counsel within the meaning of MCR 2.612(C), that the trial court abused its discretion and had no rational choice but to set aside the order. This according to the Court was because (1) Mr. Valitutti did not advise the trial court and plaintiffs' counsel, at the time of the announcement of the verbal settlement agreement between Dr. Douglass and plaintiffs, that the hospital did not agree with plaintiffs' counsel's unilateral declaration of his unilateral understanding of the legal effect of that agreement with the doctor on his claims against the hospital, and (2) "defendants' counsel" failed to include, or correct plaintiffs' counsel mistake in failing to include, in the proposed draft written stipulation and order a statement of plaintiffs' counsel's declared unilateral, and erroneous, understanding of the legal effect on the hospital of the agreement with Dr. Douglass.

Defendant submits, respectfully, that this analysis is premised on factual speculation and assumptions unsupported by the record. It further is premised on a misapplication of the law pertaining to fraud and mistake which is fundamentally inconsistent with counsel's ethical obligation to his client. The accusations in this opinion are clearly erroneous and will cause material injustice to the Hospital and its counsel in this and future representation. Further, questions of counsel's obligations to an adversary in litigation is one of jurisprudential significance deserving of clarification by the Court.

(1) There was not "fraud" within the meaning of MCR 2.612.

A fraud which warrants equity interfering with a judgment must be fraud in obtaining the judgment, and the fraud must be positive and not merely constructive. Grigg v Hanna, 283 Mich 443; 278 Mich 443 (1938). Likewise, fraud is perpetrated

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on the court when some material fact is concealed from the court or when some material misrepresentation is made to the court. DeHaan v DeHaan, 348 Mich 199; 82 NW2d 432 (1957). The proof required to sustain a motion to set aside a judgment because of fraud is "of the highest order." Kiefer v Kiefer, 212 Mich App 176; 536 NW2d 873 (1995).

On the record before th Court of Appeals it is, defendant submits, absolute error to assume the existence of fraud by Mr. Valitutti, counsel for River District Hospital. This is particularly so where the trial judge himself who was present to view the demeanor of counsel, and to experience the unfolding of events in chambers first hand, explicitly determined there was no fraud on the court:

> Further, there is no credible evidence that the dismissal was understood by the doctor to be merely a covenant not to sue. At the same time, the record is also very clear that counsel for plaintiff never intended to waive his right to pursue vicarious liability claims against River District Hospital. Unfortunately for plaintiffs it has had that legal effect.
>
> Silence in the face of plaintiff's counsel's declaration of intent does not amount to an agreement. The attorneys for the defendants owed their duty only to their clients. Further, I am of the opinion that the relief being sought under MCR 2.612 is not justified under the facts of this case. Any mistake made is a mistake of law and not of fact. [Tr 4/17, pp 35-36.]

The evident determination Court of Appeals in the first opinion that there was fraud on plaintiff's counsel because "plaintiffs' counsel trusted that counsel for defendants would accurately prepare the stipulation and order," and defendants counsel presented to plaintiff's counsel "a written stipulation, drafted by defendants' counsel, that omitted the entire oral agreement" (Opinion p 7), is in error.

First, it is, defendant submits, an extraordinary suggestion that an attorney in an adversarial litigation proceeding can blindly rely on an opponent to include in any

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document any provision, sign that agreement, and then secure the vacating of that agreement or order as "fraudulent" upon a protestation that the adversary failed to include the full agreement!

A party that signs a contract may not avoid enforcement of the contract because they failed to read or understand the included terms. Farm Bureau Mutual Ins Co v Nikkel, 460 Mich 558, 557; 596 NW2d 915 (1999). Here, however, there has been no suggestion that plaintiffs' counsel did not read or understand the one sentence stipulation, or the two-sentence order. Upon being presented with the draft stipulation and order for review after lunch, plaintiff's counsel "took it out to confer with his co-counsel." (Tr 4/17/02, pp 20-21.)

No agreement to allow plaintiffs to continue to assert their claim of vicarious liability was ever solicited from counsel for the hospital. Instead, the only writing presented to counsel for the hospital was the written order which was entered.

As a matter of law, agreements may not be assumed. MCR 2.507(H) teaches, and limits the same to:

> (H) Agreements to Be in Writing. An agreement or consent between the parties or their attorneys respecting the proceedings in an action subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

Counsel for the hospital did not prepare the agreement; he was just asked to sign it.

Furthermore, the trial court's statement that it understood plaintiff's intent and was sure "they", i.e., Dr. Douglass and his counsel, did as well, occurred in a context which did not suggest to counsel for the hospital any reason or need to interject to advise the court whether the hospital's counsel agreed with plaintiffs' counsel's statement of intent regarding the effect of the settlement agreement by plaintiff with

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Dr. Douglass. At the time, the judge was in chambers with counsel and their clients; the judge was turning to each of the assembled groups, inquiring of each counsel regarding their own client's settlement stipulations and offers (Tr 4/16/04, pp 6-7). The court began its inquiry with Mr. and Mrs. Stamplis and their counsel, and then turned to counsel for Dr. Douglass (Id., pp 8-9).

The statement by the trial court regarding understanding the plaintiffs' intent followed and was specifically with reference to plaintiffs and Dr. Douglass, and their comments regarding their separate understandings of their specific agreement (Id., p 10). The court then turned to Mr. Valitutti, counsel for the hospital, to place on the record his client's settlement position, which Mr. Valitutti did, making an offer of $300,000 (Id, pp 10-11). The hospital was not a party to or involved in the settlement agreement between the doctor and plaintiffs, and had no reason to comment on the same at the time. Further, this was not in the context of a courtroom setting, nor were counsel expected or permitted to engage in legal argument.

There was no fraud by counsel for the hospital or counsel for Dr. Douglass. There was effective advocacy by hospital counsel in refusing to rely upon his opponent's representation of the legal effect of the other parties' actions, in researching the issue and then in moving based on that research to protect his client's rights to the fullest extent. There was effective advocacy by hospital counsel in refraining from educating one's opponent about potential legal arguments which could be raised in zealous advocacy in support of his client's position. There was effective advocacy by counsel for Dr. Douglass in declining to unilaterally include in the stipulated order of dismissal terms to which the doctor had not agreed.

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The duty the first opinion of the Court of Appeals would impose on counsel for the hospital to avoid the label of "fraud" would require counsel to act in contravention of his legal and ethical obligations to represent vigorously the interests of his client in this adversarial proceeding against a party represented by competent counsel.

The Rules of Professional Conduct require counsel to represent his client "with diligence." Rule 1.3. As the Comment to Rule 1.3 states, counsel should "take whatever lawful and ethical measures are required to vindicate his client's cause," and act with "zeal in advocacy upon the client's behalf." The Rules prohibit counsel from making a false statement of material fact or law to the tribunal or any person. Rule 3.3(a) "Candor Toward The Tribunal") and Rule 4.1 ("Truthfulness in Statements To Others").

The Rules, however, do not impose an affirmative duty to disclose even material facts to a tribunal except in an ex parte proceeding. Rule 3.3(d). Likewise, the Rule imposes on counsel an affirmative obligation to disclose law to a tribunal only with respect to "controlling legal authority in the jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." (Emphasis added.) As the Comment to the rule notes: "Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party" except in an ex parte proceeding.

In light of these principles under which counsel for the hospital, Mr. Ralph Valitutti, was obliged to conduct himself, the failure to advise opposing counsel or the court that he would be arguing that opposing counsel's statement of the legal effect of his agreement was not correct could not be improper, let alone rise to the level of

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"fraud" on court or opposing counsel. As stated in Matley v Matley (On Remand), 242 Mich App 100; 617 NW2d 718 (2000), "A fraud is perpetrated on the court when some material fact is concealed from the court or some material misrepresentation is made to the court." However, in Matley, the Court held in light of MRPC 3.3, that fraud cannot be committed on the Court in an adversary hearing with respect to facts not known by the court, but known to both parties.

> If an advocate generally has the responsibility to present only one side of the matters at issue, then a party cannot commit fraud on the court by failing to disclose to the court facts that are adverse to his position where the facts are known by the opposing party.
>
> Here, both parties were represented by counsel at the arbitration hearing. Therefore, defendant and his attorney had "the limited responsibility of presenting one side of the matters that a tribunal should consider" to make its decision. MRPC 3.3. While it is inequitable, and contrary to the divorce judgment, that plaintiff was required to make the lease and insurance payments for the months the Honda was not in her possession, it was plaintiff's responsibility to correct any incorrect statement of fact or omission of fact made by defendant during the arbitration proceedings and to inform the court that the Honda had not been in her possession since March 1993. She had the opportunity to do so in her arbitration brief and at the arbitration hearing, where she was represented by counsel.

This reasoning compels the conclusion that there cannot as a matter of law be fraud on the court, or on one's opposing counsel in an adversary proceeding, by failing to warn the court or counsel in advance of the legal pitfalls of an announced strategy by opposing counsel.

Further, the declaration in the first opinion of the Court of Appeals that "the written stipulation did not reflect what was agreed to by plaintiffs or Dr. Douglass" is patently incorrect. There is nothing in the record to establish that plaintiffs' counsel's unilateral expression of his intent as to the legal impact of the dismissal was in fact agreed to by Dr. Douglass and part of their agreement! To the contrary, Dr.

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Douglass' counsel repeatedly denied any such agreement. It could not be fraud to fail to include in the written embodiment of the parties' agreement a term upon which there in fact was no meeting of the minds.

Without merit is plaintiffs' reliance below on decisions addressing a claim of "silent fraud," e.g., US Fidelity and Guaranty Co v Black, 412 Mich 399; 313 NW2d 77 (1981), Hord v Environmental Research Institution, 463 Mich 399; 617 NW2d 543 (2000). Michigan law remains clear that mere nondisclosure is insufficient to establish fraud. Hord, supra. "[M]ere nondisclosure is insufficient. There must be circumstances that establish a legal duty to make a disclosure." Hord, supra.

While the Court in Hord did note that "a legal duty to make a disclosure will arise most commonly in a situation where inquiries are made by the plaintiff to which the defendant makes incomplete replies that are truthful in themselves but omit material information," such is not the situation here. As was the case in Hord, there was in fact no evidence either that plaintiffs made any inquiry, or that there was an incomplete response by defendants to plaintiffs:

> There was no evidence that the plaintiff made any inquiry about the financial condition of the company in general or requested updated financial data in particular. The information was provided with a number of other basic documents about the defendant, and was not in response to any request for information by the plaintiff. [Hord, supra.]

There is no evidence, nor even an allegation, that either counsel for Dr. Douglass or counsel for River District Hospital made any representation to plaintiffs whatsoever regarding the legal effect of that agreement or of the order of dismissal with prejudice, either before plaintiffs' counsel proposed this scheme, or prior to the motion for summary disposition.

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Finally, the hospital submits that it would be inappropriate to extend the doctrine of "silent fraud" to the adversarial arena of litigation, and to communications by counsel charged with the duty to act as advocates on behalf of their clients. Plaintiffs' argument below that the failure of counsel for the hospital or counsel for Dr. Douglass to advise plaintiffs' counsel that they disagreed with him regarding the legal effect of the agreement between plaintiff and Dr. Douglass, which had already been reached, constituted fraud under MCR 2.612(1)(c) is patently without merit. Such silence regarding hospital counsel's belief as to the legal effect of an agreement already reached between co-counsel cannot constitute fraud sufficient to set aside an order entered pursuant to agreement of the parties under MCR 2.612.

It also must be kept in mind that this proposal was made by plaintiffs' counsel, not out of charity, but out of a deliberate trial strategy to gain advantage at the time of trial. By voluntarily dismissing Dr. Douglass, plaintiffs' counsel sought to reduce the effectiveness of the defense by eliminating one of the defendants so as to face counsel for two, not three. Plaintiffs' counsel further likely sought the advantage of eliminating the last individual defendant and leaving before the jury the grievously disabled and sympathetic plaintiff facing the faceless, and deep-pocketed, corporate defendants. The hospital, on the other hand, was left without the presence and assistance of the very individual for whose conduct it was sought be held liable. Further, in this particular case, the hospital potentially was left without the benefit, as co-counsel, of the attorney who previously had represented the hospital and who, more importantly, had firsthand knowledge of the history and discovery in this four-year-old lawsuit.

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The Court of Appeals clearly exceeded its authority as a reviewing court subject to an abuse of discretion standard of review and concluding that, contrary to the findings of the trial court judge, there had been "fraud" by defendants' counsel.

(2) There was not "mistake" within the meaning of MCR 2.612.

There was no "mistake" sufficient to not merely allow, but require the order to be set aside under MCR 2.612(1)(a). In Limbach v Oakland County Road Commissioners, plaintiff asserted a mistake by their counsel with respect to the legal effect of an agreement to dismiss a cross-claim "with prejudice," virtually identical to that here. The Court of Appeals held that such a claim did not permit it to find an abuse of discretion by the trial court in declining to set aside the stipulated order under MCR 2.612. The Court declared:

> This type of mistake might be sufficient to allow a trial court to grant relief from judgment [citation omitted]. However, it is not the type of mistake warranting reversal of a trial court's denial of relief. See Hauser v Roma's of Michigan, Inc, 156 Mich App 102, 105-106; 401 NW2d 630 (1986). Indeed, MCR 2.612(C)(1)(a) was not 'designed to relieve counsel of ill-advised or careless decisions.' Lark v Detroit Edison Co, 99 Mich App 280, 283; 297 NW2d 653 (1980). [Limbach, 393, footnote omitted].

While even assuming, as the Court in Limbach suggested, that a stipulation may be set aside where there is evidence of mistake, fraud, or unconscionable advantage, an alleged mistake as to the legal effect of a stipulated dismissal with prejudice is "unilateral and would not justify putting aside or modifying the stipulation. See Rezepka v Michael, 171 Mich App 748, 756; 431 NW2d 441 (1988)." Limbach, 394.

Defendant further submits that the "mistake" by plaintiff's counsel cannot upon principled application of precedent entitle plaintiff to appellate relief from the judgment. As the Court notes, it held in Limbach, supra, that: "Indeed, a stipulation is

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a type of contract, and contract defenses are available to a party who seeks to avoid a stipulation." However, Eaton County Board v Schultz, 205 Mich App 371; 521 NW2d 847 (1994), also cited in Limbach in support, prohibits the lead opinion's further conclusion that the mistake of plaintiff's counsel, whether factual or legal, entitled him to relief. The parties could not make a binding stipulation of law. In Eaton, 379, the Court declared:

> Our Supreme Court has distinguished between stipulations of fact, which are binding, Dana Corp v Michigan Employment Security Commission, 371 Mich 107 (1963) and stipulations of law which are not binding." In Re Finley Estate, 430 Mich 590.

On the other hand, a stipulation of fact, however erroneous, is binding. In Dana Corp v Michigan Employment Security Commission, 371 Mich 107; 123 NW2d 277 (1963), the Court declared:

> Once stipulations [of fact] have been received and approved they are sacrosanct. Neither a hearing officer nor a judge may thereafter alter them. This holder requires no supporting citation. The necessity of the rule is apparent. A party must be able to rest secure on the premise that the stipulated facts and the stipulated ultimate conclusionary facts as accepted will be those upon which adjudication is based. Any deviation therefrom results in a denial of due process for the obvious reason that both parties by accepting the stipulation have been foreclosed from making any testimonial or other evidentiary record.

Plaintiff's counsel's mistake here, be it of fact or law, was unilateral and thus "was not the type of mistake warranting reversal of a trial court's denial of relief." Limbach, supra, 393, 394. Plaintiffs have failed to demonstrate the existence of facts which would compel the setting aside of a stipulated agreement between plaintiffs and Dr. Douglass--a contract binding under MCR 2.507(H) and common law contract principles. Plaintiffs have also failed to demonstrate mutual mistake, fraud or unconscionable advantage as required to void a contract. See Meyer v Rosenbaum,

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71 Mich App 388; 248 NW2d 558 (1976), Pedder v Kailish, 26 Mich App 655; 182 NW2d 739 (1970).

The first opinion of the Court of Appeals clearly misapplied fundamental principles of Michigan jurisprudence to find "mistake" here sufficient to warrant interference with the trial court's exercise of discretion.

C. The Court Of Appeals In The Second Opinion For Reversal Has Clearly Erred In Finding On This Record And Under Michigan Law That There Was Such A "Clerical Mistake," That Judge Daniel Kelly Committed An Abuse Of Discretion In Declining To Set Aside The Parties' Stipulation, And Judge Kelly's Order Of Dismissal With Prejudice Pursuant To MCR 2.612(A), Which Has Never Been Cited Or Relied Upon By Plaintiffs Below Or On Appeal.

In the second opinion for reversal, Judge Kelly concluded that the trial court "abused its discretion in denying plaintiffs' request for relief from judgment under MCR 2.612(A)(1) on the basis of a "clerical mistake in the order dismissing Dr. Douglass." Defendant submits that this conclusion was in error, first, because plaintiffs had never argued there was a "clerical error" or sought relief under MCR 2.612(A), below or on appeal. Surely, a trial judge should not be held to have committed an "abuse of discretion" for failing to sua sponte grant relief on a ground never advanced by a party.

Further, had the issue been raised below and on appeal, it would not have been an abuse of discretion for the trial court to have declined to have granted relief. MCR 2.612(A)(1) provides:

> Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after notice, if the court orders it.

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The purpose of MCR 2.612(A)(1) is to make the lower court record and judgment accurately reflect what was done and decided at the trial level. McDonald's Corporation v Canton Township, 177 Mich App 153; 441 NW2d 37 (1989). The rule improperly would be applied here to amend the order of the trial court to reflect what plaintiffs' counsel unilaterally had intended to do, not what was actually agreed to by the parties or intended by the trial court.

In Grettenberger Pharmacy, Inc v Blue Cross-Blue Shield of Michigan, 120 Mich App 354; 296 NW2d 589 (1982), the Court summarized the principles applicable to revising an order because of "clerical error".

> [T]he purpose of GCR 1963, 528.1 [now MCR 2.612(A)] is:
>
> "* * * to make the lower court record and judgment accurately reflect what was done and decided at the trial level. When the alleged error is in the court's action itself, as distinguished from the record made of the court's action, the alleged error is not a clerical mistake under this rule." 101 Mich App 433. (Citations omitted.)
>
> The Court went on to note that when a plaintiff is not attempting to change the original judgment to more accurately reflect what was done and decided by the lower court but rather is attempting to add something to the prior judgment which was neither discussed nor decided, a motion under GCR 1963, 528.1 is unavailable. Stokus, p 434.

In Grettenberger Pharmacy, the Court refused to find an abuse of discretion by the trial court where the amendment sought was not merely to reflect the actual ruling of the court:

> We find that the plaintiff here is not attempting to change the original judgment to more accurately reflect what was done and decided at the trial level but is trying to add something to the judgment not discussed below. Plaintiff is attempting to add the Farmer Jack Pharmacies to the class list so that they will be included in the judgment despite the fact that such an addition would decrease the defendant's entitlement to funds returnable under the judgment, which was based upon a list compiled by the plaintiff's attorneys and relied upon by the trial court as complete and accurate. Thus, although the error occurred in the

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> clerical compilation of the class list, the ensuing court action was based upon that error and the subsequent judgment accurately reflects what was done and decided at the trial level—i.e., specified members of a class list were entitled to share in a judgment, with the defendant receiving a calculable sum in return. Under these circumstances, relief for a clerical mistake under GCR 1963, 528.1 is inappropriate.

Surely the trial court and signatory to the order at issue would be in the best position to determine if an order properly reflected the parties' actual agreement, as finally reduced to their written stipulation, as the order on its face states it is doing. Indeed, the order on its face clearly, and accurately, reflects the parties' written stipulation. The order, and stipulation, concededly do not reflect the unilateral oral statements of plaintiffs' counsel regarding his subjective intent prior to reducing the agreement to writing. However those statements were not agreed to by opposing counsel, did not reflect any agreement stated in writing or on the record by opposing counsel, and is utterly irrelevant to the content of the written stipulation and, therefore, to the content of the order executing that agreement.

Accordingly, the hospital respectfully requests that this Court review this matter and find that the Court of Appeals majority expressed, and had, no lawful basis upon which to interfere with the trial court's exercise of discretion in declining to set aside the order of dismissal with prejudice, to which plaintiffs stipulated, under MCR 2.612.

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RELIEF REQUESTED

WHEREFORE, defendant St. John Hospital respectfully requests that this Honorable Court peremptorily reverse the judgment of the Court of Appeals and reinstate the judgment of the trial court or, in the alternative, that the Court grant leave to appeal.

Respectfully submitted,

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